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NOTES.

RESTRAINTS ON THE ALIENATION OF EQUITABLE FEES IN PENNSYLVANIA.—Mr. Gray wrote in 1883: "It is specially observed that even in Pennsylvania, the mother of the so-called spendthrift trusts, that is, trusts giving inalienable equitable life estates, inalienable equitable fees are not allowed."[1] He based that statement on Keyser's Appeal[2] in which the *cestui que trust* was permitted to terminate the trust notwithstanding a clause against involuntary alienation. Keyser's Appeal[3] was generally considered to indicate that the Pennsylvania court would not permit a spendthrift trust to be attached to any estate higher than an equitable life estate, until the dicta in several cases decided in more recent years have again thrown the question in doubt.

[1] Gray: Restraints on the Alienation of Property, 1st ed., par. 115 (1883).
[2] 57 Pa. 236 (1886).
[3] Note 2, *supra*.

In Gunnell's Estate,[4] a recent Pennsylvania case, the testatrix directed that all of her property should be divided equally among her six nephews, the share going to her nephew Harry Knight "to be held in trust for him, he to receive the income during his natural life without being subject to debts, contracts or engagements, and without the power or right of anticipation or alienation in any manner." Upon the death of Harry Knight, the Orphans' Court ordered his trustee to pay the corpus of his share to the administrator of his estate, and from that order an appeal was taken. The Supreme Court dismissed the appeal and held that "now that the trust for him (Harry Knight) is at an end, by reason of his death, the court below correctly held that the corpus, of the share from which he received the income during his life, should go to his administrator; the testatrix intended that Harry Knight should take an absolute interest, and that absolute interest was not cut down to a life estate by the trust created for his life."

Gunnell's Estate[5] arose after the death of the *cestui que trust*, so the court did not have to decide the effect of the clause restraining the voluntary and involuntary alienation of the estate during his lifetime. The case nevertheless suggests the question: What would the court have decided if the devisee in his lifetime had attempted to alienate the estate, or if his creditors had attempted to attach it? That inquiry cannot be answered conclusively, but it prompts a review of some of the Pennsylvania cases since Keyser's Appeal[6] in order to determine whether or not the recent cases are in rapport with that case.

It has been stated that the rule under which the Statute of Uses operates to give the *cestui que trust* the legal title at once, when the trust is dry, does not apply to executors in Pennsylvania; but that the executors are considered to have the legal estate, and the *cestui que trust* the equitable estate, until the executors pay it over.[7] If that statement is correct, Keyser's Appeal[8] would not be an authority against spendthrift trusts being attached to an equitable fee, for, in that case,[9] the trust was dry, and the *cestui que trust* immediately became invested with the legal estate and the right to demand it. By the same reasoning, however, Beck's Estate[10] and Goe's Estate[11] would seem to be authority for the proposition

[4] 269 Pa. — (Feb. 1921).

[5] Note 4, *supra*.

[6] Note 2, *supra*.

[7] Gray: Restraints on the Alienation of Property, 2d. ed., par. 124g. (1895).

[8] 57 Pa. 236 (1886).

[9] Keyser's Appeal, *supra*.

[10] 133 Pa. 51, 19 A. 302 (1890). Testatrix gave a share in her estate to her step-daughter, and provided that it should not be liable for debts. A creditor obtained a judgment against the legatee and issued thereon an attachment which was served against the executor. *Held:* Payment must be made by the executor to the legatee, notwithstanding the attachment execution.

[11] 146 Pa. 431, 23 A. 383 (1892). A share in an estate was given with a clause restraing alienation for debt. *Held:* The attaching creditor could not reach the share of the legatee in the hands of the executor.

that equitable fees may be subjected to spendthrift trusts; for, under this view, the estates involved in those cases were equitable fees.[12]

In Minnich's Estate[13] the testatrix left to her son the net income of a share in her estate without a devise over of the corpus after his death. She left the corpus of the share to a trustee who had active duties to perform, and it was expressly provided by the testatrix that it should not be liable for any of the debts of the son. The court held that a valid spendthrift trust was created which could not be allowed to be defeated by handing over to the son the corpus of his share in the estate.[14] This case would seem to be strongly in favor of the validity of spendthrift trusts when attached to equitable fees,[15] but it is not a direct authority because the court did not decide whether the son took an equitable life estate or an equitable fee, or what would happen to the estate after the death of the son.

Substantially the same view was reached in a subsequent case decided by one of the lower courts,[16] but this decision is not of controlling authority. Minnich's Estate[17] was referred to in Shower's Estate[18] where the trustee took the legal estate and the *cestui que trust* took the equitable estate, in which case the court stated that the *cestui que trust* could not terminate the trust that was created, and that the estate was exempt from involuntary alienation. The court went much further in that case than was necessary, however, because the will contained nothing at all about involuntary alienation. The result reached in that case seemed to be prompted by a desire on the part of the court to carry out the intention of the testatrix which was, according to the court, that the *cestui que trust* should not be able to impair or diminish the principal.

In the instant case, the court referred to Boie's Estate[19] and Kelly v. Pennsylvania Railroad Company,[20] as being most apposite to the case under its consideration. In both of those cases it was

[12] Gray: Restraints on the Alienation of Property, 2d. ed., par. 124g (1895); see, however, the explanation of Beck's Estate, *supra*, and Goe's Estate, *supra*, in Foulke's Rules Against Perpetuities, Restraints on Alienation, Restraints on Enjoyment, par. 222, and par. 223 (1909).

[13] 206 Pa. 405, 55 Atl. 1067 (1903).

[14] The son claimed that he was entitled to the legal estate on the ground that there was no devise over.

[15] Foulke, note 12, *supra*, par. 248.

[16] Wright's Estate, 28 Pa. C. C. 540 (1903). The court sustained a clause against involuntary alienation as against the attaching creditor of the cestui que trust.

[17] 206 Pa. 405, 55 Atl. 1067 (1903).

[18] 211 Pa. 297, 60 Atl. 789 (1905). The testator directed that his property be divided equally among his children, the share going to a certain son to be received by a trustee to invest the same, so that the son would enjoy the interest thereof, but in no way impair or diminish the principal. There was no gift over.

[19] 177 Pa. 190, 35 Atl. 724 (1896).

[20] 226 Pa. 540, 75 Atl. 734 (1910).

held that an absolute gift could not be reduced to a life estate merely by the use of qualifying words which placed the corpus of the estate in trust for the devisee during his life, the devisee to receive the "usufructs and profits." On the contrary, it was held in those cases that the devisee took an equitable fee without being stripped of the authority to dispose of it, by will or otherwise, to take effect at his death. In neither of the above two cases were there provisions against alienation, but the object of the testator, states the court, was to protect the devisee from his own improvidence. If the law permits an absolute gift to be held in trust during the life of the devisee, when the trust is active,[21] for the purpose of protecting the devisee from his own improvidence, there should be no difficulty, under the same law, in accomplishing the same object by expressly providing against alienation. In each case the devisee would benefit as though he held a life estate, except that he would have the right to dispose of the corpus by will, or else it would go to his heirs. It is true that the trusts were active in Boie's Estate[22] and in Kelly v. Pennsylvania Railroad Company.[23] It is equally true that there is some authority for the proposition that the mere imposition of a spendthrift trust to a gift will not make the trust active, but it is submitted that the cases cannot be satisfactorily distinguished upon that ground.

There is no reason, moreover, why a court which permits a spendthrift trust to be attached to an equitable life estate should not permit it in connection with an equitable fee. Such a trust could, by such a court, be held valid without the importation of any new principles and without a departure from the reasoning of the earlier cases. The new principles were adopted when the courts first permitted a spendthrift trust to be imposed on an equitable life estate, because the courts then, in effect, created an equitable estate with new incidents, and for which there was no corresponding legal estate. It has been recognized by two decisions and one dictum that the principle of spendthrift trusts should not be limited to equitable life interests. These cases arose in Massachusetts,[24] Illinois,[25] and Iowa.[26]

Before Gunnell's Estate,[27] no case warranted the statement that an equitable fee could in Pennsylvania be subjected to a spendthrift trust. It is believed, however, that this case does warrant such a statement. While inferences from the language

[21] Kreb's Estate, 184 Pa. 222, 39 Atl. 66 (1898).

[22] See note 19, *supra*.

[23] See note 20, *supra*.

[24] Haskell v. Haskell, 125 N. E. 601 (Mass. 1920). The court held that restraints on alienation are valid as respects equitable fees in real estate and in personal property.

[25] Hopkinson v. Swaim, 284 Ill. 11, 119 N. E. 985 (1918), where the court in its decision stated that there was no reason for such a rule in the case of a life estate which does not apply equally to a fee during the life of an owner.

[26] Kiffner v. Kiffner, 185 Iowa 1064, 171 N. W. 590 (1919).

[27] See note 4, *supra*.

used by the court may be drawn to that effect, yet there is still a stronger reason for such a belief. Minnich's Estate[28] decided that a valid spendthrift trust was created, but it did not decide the *quantum* of the estate taken by the *cestui que trust*, that is, whether it was a life or an absolute interest; Gunnell's Estate, which arose on facts that were substantially the same as the facts in Minnich's Estate, decided that the *cestui que trust* takes an absolute interest. The conclusion seems inevitable therefore, that Gunnell's Estate and Minnich's Estate, considered together, indicate that a restraint may be placed on the alienation of an absolute equitable interest in Pennsylvania.[29]

H. F. B.

CONSTITUTIONALITY OF STATUTE FIXING VENUE FOR CRIMES COMMITTED NEAR COUNTY BOUNDARIES.—A popular statute among legislatures in the United States for the purpose of obviating the difficulty in proving the actual location of crimes committed at or near the boundaries of counties, is an enactment which provides that for offenses committed within 500 yards of the boundary, the offender may be tried in either county, regardless of the actual situs of the wrongful act.[1] Such statutes have met with varying treatment at the hands of the courts, depending somewhat upon the wording of the state constitutions as to trial by jury and somewhat upon the attitude of the court toward the trial by jury provision.

The requirement that the jury must be from the vicinage, ("*de vicineto*"), which is the provision that this statute generally is said to infringe, is one of the earliest developments of the English criminal law. The very word for jury in the Year Books is *pais*, ("country"). Originally the meaning attached to vicinage was *visne* or neighborhood.[2] Coke defines it as the "Town, Parish or Hamlet, or Place known out of the Town, etc., within the Record, within which the Matter of Fact issuable is alleged, which is most certain, and nearest thereto, the Inhabitants whereof may have the

[28] See note 13, *supra*.

[29] A very thorough examination of the cases, bearing upon restraints on the alienation of property, will be found in: Gray, Restraints on the Alienation of Property (1895); and in Foulke's Rule Against Perpetuities, Restraints on Alienation, Restraints on Enjoyment (1909). Both writers explain the origin of spendthrift trusts, and the arguments for and against them.

[1] Among the states in which this statute has been passed are Alabama, Arkansas, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Michigan, Missouri, New York, Pennsylvania, Tennessee, Texas, West Virginia and Wisconsin. It has been held unconstitutional in Arkansas, Illinois, Louisiana, Missouri, Tennessee and West Virginia; constitutional in Alabama, Iowa, Minnesota, Pennsylvania (1920) and Wisconsin; and acted upon without consideration of its constitutionality in Massachusetts, Michigan, New York and Texas.

[2] Y. B. 7 Henry IV, 27; Y. B. 8 Henry VI, 34; Y. B. 17 Edward III, 56; Y. B. 47 Edward III, 6.